

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SONYA BARNES,

Defendant-Appellant.

UNPUBLISHED

May 5, 2009

No. 284886

Wayne Circuit Court

LC No. 07-020267-FC

Before: Sawyer, P.J., and Murray and Stephens, JJ.

MEMORANDUM.

Following a bench trial, defendant was convicted of second-degree murder, MCL 750.317, and sentenced to a prison term of 20 to 30 years. She appeals as of right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Contrary to defendant's argument on appeal, trial counsel was not ineffective for failing to move to suppress the tape of the decedent's 911 call on the basis of the Confrontation Clause. Any motion would have been futile. The statements were not testimonial, inasmuch as the primary purpose was to enable police assistance to meet an ongoing emergency. *Davis v Washington*, 547 US 813, 822; 126 S Ct 2266; 165 L Ed 2d 224 (2006). Moreover, even if the statements to the 911 operator could be deemed "testimonial," they qualify as dying declarations, which "are an historical exception to the Confrontation Clause under *Crawford*." *People v Taylor*, 275 Mich App 177, 183; 737 NW2d 790 (2007). Counsel is not ineffective for failing to bring a futile motion. *People v Flowers*, 222 Mich App 732, 737-738; 565 NW2d 12 (1997).

Affirmed.

/s/ David H. Sawyer

/s/ Christopher M. Murray

/s/ Cynthia Diane Stephens